Supreme Court, U.S.
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Case No. 93-780

In The

Supreme Court of the United States

October Term, 1993

ST. LOUIS SOUTH PARK, INC.,
d/b/a MERCY CONVALESCENT CENTER,

Petitioner,

vs.

MISSOURI DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF MEDICAL SERVICES,

Respondents.

On Petition For Writ of Certiorari To The Missouri Court of Appeals, Western District

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether a Medicaid reimbursement plan which allows for differing amounts of inflation to similarly situated nursing homes, based solely on the date their fiscal years end, complies with the equal protection clause of the Fourteenth Amendment to the United States Constitution when formulating new alternative prospective per diem rates.

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Opinion Below

The Opinion of the Missouri Court of Appeals, Western District is reported at 857 S.W.2d 304 (Mo. App. 1993), and attached at Appendix, page 1 to 8.

Jurisdictional Grounds

This Court should not have jurisdiction to grant the Petitioner's Writ of Certiorari because the Missouri state court of last resort in this case did not decide the equal protection issue in a way that conflicts with applicable decisions of this court, another state court of last resort, or a United States Court of Appeals. In fact, the Missouri state court Decision cites or relies on some eleven (11) equal protection case decisions of this Court. Further, this Court lacks subject matter jurisdiction in this matter because the Petitioner lacks standing by not having the necessary liberty or property interest that is required before it can have a constitutional right to equal protection; or this suit involves a non-justiciable issue so the Court should decline jurisdiction. These jurisdictional issues are more fully discussed in the argument section of this brief.

The Constitutional and Regulation Provisions involved in the case

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Missouri regulation 13 C.S.R. § 70-10.010 (11/20/90) provides in pertinent part as follows:

> **13 C.S.R. § 70-10.010 Prospective Reimbursement Plan for Long-term Care**
>
> . . .
>
> (E) The Medicaid per-diem rate shall be the lower of –
>
> 1. The Medicare (Title XVIII) per-diem rate, if applicable;
>
> 2. The per-diem rate as determined in accordance with section (11); or
>
> 3. The long-term care ceiling. The long-term care ceiling in effect on July 1, 1990 shall be a per-diem rate of fifty-four dollars and ninety-five cents ($54.95). The long-term care ceiling will be increased by the amounts prescribed in paragraph (12)(A)1. effective for the dates of services and purposes specified in paragraph (12)(A)1.
>
> . . .
>
> (11) Rate determination. Subject to limitations prescribed elsewhere in these regulations, a facility's per-diem rate shall be determined by the division as described in this section.
>
> (A) A facility with a valid Medicaid participation agreement in effect on June 30, 1990 and with a cost report on file with the division as of December 31, 1989 with a period ending in calendar 1988 shall be granted a prospective per-diem rate effective for service dates on and after

July 1, 1990. This rate will be the greater of the amount determined in accordance with paragraph (11)(A)1. or 2.

1. The allowable cost per-patient day as determined by the division from the desk-reviewed and/or field-audited cost report with a period ending in calendar year 1988 will be multiplied by one hundred eleven and one-tenth percent (111.1%). One dollar and six cents ($1.06) will be added to this adjusted cost per-patient day amount to allow for the April 1, 1990 change in the minimum wage and the total will be subject to and limited by the ceiling amount of fifty-four dollars and ninety-five cents ($54.95). The division will use a cost report which has an ending date in calendar year 1988 which is on file with the division as of December 31, 1989 and no amended information will be accepted after that date. If a facility has more than one (1) cost report with periods ending in calendar year 1988, the report covering a full (12)-month period ending in calendar year 1988 will be used. If none of the reports covers twelve (12) months, the report with the latest period ending in calendar year 1988 will be used.

2. The per-diem rate in effect for services rendered on June 30, 1990.

Statement of the Case

The Respondents wish to make the following additions and corrections to the Petitioner's Statement of the Case. References to the Appendix will be to "A-" followed by the page number where it is found in this brief's appendix. References to St. Louis South Park, Inc. will be to "Petitioner" or "Mercy". References to the Missouri Department of Social Services, Division of Medical Services will collectively be to "DMS" or "Respondent".

Mercy's Petition would have the tendency to mislead this Court if the Court is not wary.

As the Court can clearly see from the regulatory language quoted in the above brief section, this case *really* involves a regulation that establishes new prospective rates for each and every Title XIX Medicaid provider nursing home in Missouri. (See: 13 C.S.R. § 70-10.010(3)(E)).

The regulatory version that was effective July 1, 1990 was a completely new reenacted regulation, and the prior regulatory version was rescinded. (See: 15 Mo. Reg. 1364).

Mercy very carefully alleges that the "discriminatory treatment costs St. Louis South Park more than $85,000 per year – money that could well be used to care for its frail, indigent residents". (Mercy's Petition at page 2). In real life though that $85,000 could also be used for such things as to buy the owner of Mercy a new Mercedes Benz or a wild vacation around the world. The reason to suspect Mercy's credibility is found in the evidence of this suit itself. Respondent's Exhibit G shows that Mercy

had 1988 average adjusted costs of $40.91 but was being paid $43.50, so Mercy was already receiving an adjusted profit of $2.59. (Exhibit G and 14; Transcript pages 68-70).

Mercy's only claim in this suit is that the 111.1% methodology of the New Plan purportedly violates Mercy's equal protection rights. It is obvious that there are no other claims in the suit regarding any substantive right Mercy might have to a bigger rate. Yet, Medicaid law is replete with substantive challenges to rates – if the nursing home is really suffering hardship. A couple of those laws that grant nursing home providers substantive rights to rates are found at § 208.152 RSMo, and 42 U.S.C. § 1396a(a)(13)(A). Section 208.152 RSMo requires that rates be made on the basis of *reasonable* costs of the care or *reasonable* charge for the service – While 42 U.S.C. § 1396a(a)(13)(A) requires DMS to pay for services through rates that are *reasonable* and adequate to meet the costs which an efficient and economical provider must incur. See: *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 110 L.Ed.2d 455, 110 S.Ct. 2510 (1990).

Both State and Federal law place some kind of burden upon DMS that rates be *reasonable* – yet Mercy does not bring up any allegation that the rate assigned to Mercy is not reasonable in light of Mercy's costs. In the interest of succinctness DMS will not further discuss Mercy's failure to raise a Medicaid substantive claim here in this brief part but will further discuss that failing in the argument section of this brief.

Summary of the Argument

Throughout Mercy's Petition for Writ of Certiorari, Mercy is attempting to distract the Court from the absolute accuracy of the Court of Appeals' Decision from below. DMS's arguments against this Court granting Mercy's Petition for Writ of Certiorari are as follows:

1. **This Court either lacks subject matter jurisdiction, or should deny jurisdiction because the Petitioner has no underlying substantive right to be protected by the Constitutional equal protection clause.**

The Constitution without more does not create any property interest. *Board of Regents v. Roth*, 408 U.S. 564, 561, 33 L.Ed.2d 548, 561, 92 S.Ct. 2701 (1972). Other case law indicates that Mercy would have no property interest in a prospective per diem rate – thus, Mercy has no basis upon which to bring its constitutional challenge, has no standing, or the Court should decline jurisdiction for justiciable reasons.

2. **The Court should deny this Petition for a Writ of Certiorari because the Decision from the State Court of Appeals is firmly foundationed upon settled case determinations made by this Supreme Court, so the only issue involved is now a well settled area of the law.**

Simple review of the Decision from below will show that there is no merit to Mercy's arguments that Missouri Courts are ignoring this Court's rulings.

The equal protection issue in the Decision from below shows the court utilized either directly or indirectly, some eleven (11) different U.S. Supreme Court cases when reaching its Decision. All eleven (11) of those U.S. Supreme Court cases are still viable cases being cited regularly by various courts around the country. Thus, in order to grant Mercy the relief it wants this Court would effectively have to overrule all those prior cases – and that simply is not justifiable given the facts of this case.

3. Controlling costs of Missouri's Medicaid Program is a legitimate State interest based upon the facts of this case.

The "New Plan" under review in this matter is really a mechanism designed to establish new provider nursing home rates effective July 1, 1990. The affect of the "New Plan" is to place a three (3) part limit upon how much DMS will pay for nursing care – and such reasonable limitations on costs do not violate equal protection. *New York State Soc. of Orthopedic Supreme v. Gould*, 796 F. Supp. 67, 74 (E.D.N.Y. 1992).

4. The Decision did not rule that 13 C.S.R. § 70-10.010 was valid due to "administrative convenience", for the Court below actually ruled DMS's methodology was reasonable in light of the facts of this case.

Mercy is presenting the Court with the argument that the Court below ruled that 13 C.S.R. § 70-10.010 did not violate Mercy's constitutional rights due to "administrative convenience", when in reality that argument is a misleading smoke screen designed to draw the Court's

attention away from Mercy's actual case. Mercy really has no protected right to a future per diem rate. *Weinberger v. Salfi*, 422 U.S. 749, 772, 45 L.Ed.2d 522, 542, 95 S.Ct. 2457 (1975).

But, even if the Court below did include "administrative convenience" into its reasonings that too would be allowable because it may be one of the reasons to sustain laws for facial equal protection purposes. *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 152, 64 L.Ed.2d 107, 116, 100 S.Ct. 1540, 1546 (1980).

5. It makes no difference whether Mercy wants to object to the use of twelve (12) month cost reports as a class; it is still a *reasonable* classification in light of the facts of this case.

The Decision clearly holds that the decision to use an equal twelve (12) months costs was reasonable in light of the facts of this case – and the Court below articulated several reason for upholding the classification – and that is not self-justification! The Decision is absolutely correct to uphold that classification on the basis of the many reasons articulated, for under facial equal protection analysis it only takes one valid conceivable reason to justify the classification. *Folden v. Washington State DSHS*, 744 F.Supp. 1507, 1526 (W.D. Wash. 1990).

Argument

I. This Court either lacks subject matter jurisdiction, or should deny jurisdiction because the Petitioner has no underlying substantive law right that is to be protected by the Constitutional equal protection clause.

The Court must keep in mind that the purpose of the pertinent parts of 13 C.S.R. § 70-10.010 was to create a three (3) part alternative new prospective Medicaid nursing home per diem rate structure. The regulatory rate creation process has to be different from other process transactions like contracting to have a service performed.

In *Kentucky Department of Corrections v. James M. Thompson*, 490 U.S. 454, 460, 104 L.Ed.2d 506, 514, 109 S.Ct. 1904, this Court held that in examining questions under the Fourteenth Amendment of the United States Constitution, this Court follows a two (2) step process. The first step is to decide whether there exists a liberty or property interest which has been interfered with by the State. *Id.* The second step examines whether the procedures attending upon the deprivation were constitutionally sufficient. *Id.* The *Kentucky* principles should apply to any kind of a Fourteenth Amendment challenge and should apply to the case at bar. In the *Board of Regent v. Roth*, 33 L.Ed.2d 548, this Court more fully examined what constitutes a liberty or property interest. In the instant case at hand, Mercy is alleging that it has been denied a monitory property interest, thus, no discussion will be made regarding whether the Petitioner has a liberty interest under the Fourteenth Amendment; but,

the discussion will concentrate solely on whether Petitioner has a property interest under the Fourteenth Amendment. In *Board of Regents v. Roth*, this Court stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created . . . by existing rules or understandings that stem from an independent source such as state law . . .

Board of Regents v. Roth, 408 U.S. 564, 561, 33 L.Ed.2d 548, 561, 92 S.Ct. 2701 (1972).

As stated in the *Department of Social Services v. Villa Capri Homes*, 684 S.W.2d 327, 332 (Mo. banc 1985), "[n]ursing homes participating in programs such as the Medicaid program operate at a risk". A facility's ability to obtain funds depends upon the Government's willingness to continue the program. *Id.* at 332. Petitioner has no legitimate claim of entitlement to receiving a specific prospective per diem rate under the Medicaid program. All that a facility is entitled to is reimbursement for its reasonable costs or the reasonable charge for the service. *Id.* (See: § 208.152.1 RSMo). The law is well settled that nursing homes need not be reimbursed for all their costs, nor are they always entitled to their profit. *Villa Capri*, Supra.

In *Kelly Care Limited v. O'Rourke*, 903 F.2d 170 (2nd Circuit 1991) (cert. denied), as a provider of health care services to individuals who required medical assistance,

Kelly Care argued that it had a property interest in continued and uninterrupted participation in the New York Medicaid Program. The second circuit disagreed. *Id.* The Court, relying on decisions of this Court, ruled that *Kelly Care*, did not have a legitimate claim of entitlement to uninterrupted participation in the Medicaid program. *Id.* Moreover, in *Weinberger v. Salfi*, 422 U.S. 749, 771-772; 45 L.Ed.2d 522, 542, 95 S.Ct. 2457 (1975), this Court held that a noncontractual claim to receive funds from the Public Treasury enjoys no constitutionally protected status.

In the case at hand then, Mercy would not have a property interest in receiving a prospective per diem Medicaid rate. Since Petitioner has no property interest involved in the case, any alleged interest that Petitioner may have is not subject to the protection of the Fourteenth Amendment and would deprive the Court of subject matter jurisdiction because the Petitioner has no standing. See: *Whitmore v. Arkansas*, 495 U.S. 149, 154, 109 L.Ed.2d 135, 144-145, 110 S.Ct. 1717 (1990); *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975); *U.S. v. AVX Corp*, 962 F.2d 108, 113 (1st Cir. 1992). Or alternatively, even if the Court does have subject matter jurisdiction then the Court should decline jurisdiction because Mercy's interests do not rise to a justiciable level, or involve a legislatively delegated question concerning the initial rates the State can pay for Title XIX Medicaid services. See: *Schlesinger v. Reservists to Stop War*, 418 U.S. 208, 215, 41 L.Ed.2d 706, 715, 94 S.Ct. 2925 (1974); *Powell v. McCormack*, 395 U.S. 486, 512, 23 L.Ed.2d 491, 511, 89 S.Ct. (1969).

II. The court should deny this Petition for a Writ of Certiorari because the Decision from the State Court of Appeals is firmly foundationed upon settled case determinations made by this Supreme Court, so the only issue involved is now a well settled area of the law.

From review of Mercy's arguments made in its Petition it is obvious that Mercy would like to convince this Court that the Decision from below [and for that matter all "Missouri courts"] ignores this Court's prior equal protection determinations. (See: Mercy's petition, page 6). As the Decision from below itself will show, nothing could be further from the truth; for the Court of Appeals below followed this Court's prior determinations right down the line.

Mercy's arguments miss virtually every point of law that the Court of Appeals below made and very much reminds me of how my eleven year old son responds to most of what I say with the question "WHY" – no matter what I have said, he will say "WHY"!

Review of the Decision will show that the Court below was not mislead by Mercy's arguments. The Decision cogently starts right off stating the New Plan sets per diem rates – and that each providers' 1988 cost report was the basis DMS used to determine each provider's rate from. (A-1 to 2). Then the Court below twice accurately restated the issue under appeal, as follows:

POINT ON APPEAL

> In its sole point on appeal, the Department argues that the circuit court erred by finding that the Department violated Mercy's right to

> equal protection of the law by setting Mercy's Medicaid rate according to 13 C.S.R § 70-10.010 because all Medicaid providers received a rate which reasonably reflects their cost experience.

(A-4; Decision at p. 4).

and:

> The question presented in the case at bar is whether 13 C.S.R. § 70-10.010 denied Mercy equal protection by invidiously discriminating against Mercy due to the fact that other members of Mercy's class under the regulation were allowed to factor in inflation that was experienced from April 30, 1988 to December 31, 1988, while Mercy was not.

(A-5; Decision at p. 5).

Viewed in light of the issue being raised on appeal, the Court below applied absolutely correct law to the facts of this case. Analyzation of the Decision's equal protection analysis will show the Court below relied upon one (1) Missouri Supreme Court case and three (3) U.S. Supreme Court cases when making the Decision – but, the one Missouri Supreme Court case applies several U.S. Supreme Court cases too. Those U.S. Supreme Court cases found in the Missouri Supreme Court case are as follows:

1. The one (1) Missouri Supreme Court case is *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991). However, review of *Mahoney* at 512, 513, will show Mahoney's equal protection analysis comes from eight (8) U.S. Supreme Court cases. Those cases are:

a) *Mahoney*, at p. 512 cites *Americans United v. Rogers*, 538 S.W.2d 711, 716 (Mo. banc 1976); which in turn cites *State ex rel Eagleton v. McQueen*, 378 S.W.2d 449 (Mo. banc 1964). Then review of *McQueen* at page 452-453 takes you to the direct stare decisis case of *Walters v. City of St. Louis*, 347 U.S. 231, 237-238, 74 S.Ct. 505 (1954) – which is an appeal from the Supreme Court of Missouri and absolutely supports the Decision from below.

b Second, *Mahoney* cites *San Antonio School District v. Rodiquez*, 411 U.S. 1, 61, 36 L.Ed.2d 16, 59, 93 S.Ct. 1278 (1973).

c Third, *Mahoney* cites *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626, 23 L.Ed.2d 583, 588-589, 89 S.Ct. 1886 (1969).

d Fourth, *Mahoney* cites *Loving v. Virginia*, 388 U.S. 1, 12, 18 L.Ed.2d 1010, 1018, 87 S.Ct. 1817 (1967).

e Fifth, *Mahoney* cites *Shapiro v. Thompson*, 394 U.S. 618, 634, 22 L.Ed.2d 600, 614-615, 89 S.Ct. 1322 (1969).

f Sixth, *Mahoney* cites *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 49 L.Ed.2d 520, 524-525, 96 S.Ct. 2562 (1976).

g Seventh, *Mahoney* cites *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 66 L.Ed.2d 659, 668, 101 S.Ct. 715, 724 (1981).

h Eighth, *Mahoney* cites *United States v. Carolene*, 304 U.S. 144, 153, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938).

2. Additionally, the three (3) U.S. Supreme Court cases directly cited in the Decision, absolutely supports each proposition being analyzed. Those three (3) specific citations are as follows:

   a *Bray v. Alexandria Women's Health Clinic*, 506 U.S. ___, 122 L.Ed.2d 34, 49 [19], 113 S.Ct. 753, 761-762 (1993).

   b *Dandridge v. Williams*, 397 U.S. 471, 485, 25 L.Ed.2d 491, 501-502, 90 S.Ct. 1153 (1970).

   c *McGowan v. Maryland*, 366 U.S. 420, 425, 6 L.Ed.2d 393, 398-399, 81 S.Ct. 1101 (1961). [*McGowan* is also cited in *Mahoney, Id.*]

All of the above U.S. Supreme Court decisions relate to the Decision from below and absolutely destroys Mercy's allegations that "[t]he instant case continues Missouri's practice of ignoring this Court's precedents". (Petition, page 6).

There are some eleven (11) U.S. Supreme Court cases followed by the Court below when making its decision – and none of those eleven (11) cases have ever been overruled. Furthermore, many of those cases are being followed very often by courts throughout the country. So, in order to grant Mercy what it asks for from this case the Court would have to overrule most if not all of the prior eleven (11) venerable U.S. Supreme Court cases as cited above – and this Court should not do that.

Thus, there is no reason to grant the Writ of Certiorari in this case for the Court could only wind-up reviewing the evidence in the record which is not a proper reason for granting certiorari. See: *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 82 L.Ed.2d 1273, 58 S.Ct. 849 (1938).

III. Controlling costs of Missouri's Medicaid Program is a legitimate State interest based upon the facts of this case.

As was shown in earlier parts of this brief, the New Plan was really a regulation that established through alternatives the new prospective per diem program rates for nursing homes. By now, it has been established that governmental limitations on health care costs does not violate equal protection. See: *New York State Soc. of Orthopedic Surgeons v. Gould*, 796 F. Supp. 67, 74 (E.D.N.Y. 1992). Furthermore, the Decision specifically addressed this issue when it ruled that it was not unreasonable for the State to calculate base figures for allowable costs from the data provided by the nursing homes in their most recent reviewed cost report, because it placed the facilities all on the same equal full twelve (12) month footing. (A-6).

Cost containment was not the only reason the Decision ruled the way it did, and the Decision discusses several more reasons to accompany the cost containment holding. However, the listing made in the Decision could go on and on for the imaginable reasons could be endless. A good description of this type of reasoning appears in the case of *Folden v. Washington State DSHS*, 744 F. Supp.

1507, 1526 (W.D. Wash. 1990) and appears in pertinent part as follows:

> 10. Plaintiffs conceded at oral argument that the challenged legislation is economic regulation that does not burden fundamental constitutional rights or create "suspect" classifications, such as race or national origin. Accordingly, the distinction created by the statute is subject only to minimal judicial scrutiny and will be sustained if it is rationally related to some legitimate governmental objective. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174-176, 101 S.Ct. 453, 459-460, 66 L.Ed.2d 368 (1980). Moreover, if "there are plausible reasons" for the legislation, the Court's "inquiry is at an end". *Id.* at 179, 191 S.Ct. at 461. It is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision". *Fleming v. Nestor*, 363 U.S. 603, 612, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435 (1960).

The basic equal protection statements made in *Folden* show the fallacy of Mercy's contentions for the "objective of controlling costs" cannot possibly be "standing alone" when it comes to the area of economic regulation like the case at bar.

Mercy is simply trying to mislead the Court into thinking that controlling costs must be exclusive of all else, when in this case it is just one of the reasons for the governmental regulations.

IV. The Decision did not rule that 13 C.S.R. § 70-10.010 was valid due to "administrative convenience", for the Court below actually ruled DMS's methodology was reasonable in light of the facts of this case.

Mercy misleads this Court with its allegations that the Decision is based upon "administrative convenience" – when it is not! Once again the Court must be mindful that 13 C.S.R. § 70-10.010 was setting new prospective rates for providers like Mercy. It is well established that any type of a noncontractual claim wanting funds from the public treasury enjoys no constitutionally protected status. *Weinberger v. Salfi*, 422 U.S. 749, 772, 45 L.Ed.2d 522, 542, 95 S.Ct. 2457 (1975). Mercy claims no contractual right to a future per diem rate, so in reality Mercy's claims herein are not very substantial when it comes to equal protection analysis.

In our case, Mercy is complaining that other nursing homes with later fiscal year ends *may* [or may not] have been able to factor in more of their actual inflation into their prospective per diem rates. However, this Court would have to believe that theory without any help from the evidence in the record for there is absolutely no evidence showing anyone's actual incurred inflation anywhere in the exhibits from below. To accomplish this task Mercy wants the Court to apply a universal monthly inflation factor to equalize everyone's rates that is supposed to result in adjusted costs as of the calendar year end of December 31, 1990 – yet Mercy does not in any way deny that DMS used every providers' cost report ending during 1988 and then added various amounts to it to account for such things as inflation. In other words DMS followed the regulation to the letter. Mercy simply

wants the costs recalculated using its own methodology. However, forced adoption of Mercy's methodology is not called for by equal protection analysis. This Court has most aptly addressed a similar situation as follows:

> [429 US 185]
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> II
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> [3, 4] The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering v. Davis*, 301 U.S. 619, 640, 81 L.Ed. 1307, 57 S.Ct. 904, 109 ALR 1319. In enacting legislation of this kind a government does not deny equal protection "merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality' ". *Dandridge v. Williams*, 397 U.S. 471, 485, 25 L.Ed.2d 491, 90 S.Ct. 1153.

Matthews v. DeCastro, 429 U.S. 181, 185, 50 L.Ed.2d 389, 393-394, 97 S.Ct. 431 (1976).

The Decision from below shows that 13 C.S.R. § 70-10.010 fully complies with the *Matthews* analysis. Among other things the Court below ruled it was not unreasonable to use the last set of reviewed cost reports

DMS had because that process did such things as simplify accounting procedures, placed all facilities on an equal full twelve (12) month footing, took into account seasonal fluctuations by using a common denominator of twelve (12) months, and last but not least, the State's method is not unjustly or irritatingly discriminating. (A-6).

The Decision below did not justify itself due to "administrative convenience", but even if it had it probably would not have been an error, for several cases have now indicated that administrative convenience may be sufficient for equal protection purposes if it rises to a certain level or is combined with other factors. See: *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152, 100 S.Ct. 1540, 1546, 64 L.Ed.2d 107, 116 (1980); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116-117, n.48, 96 S.Ct. 1895, 1911, n.48, 48 L.Ed.2d 495, 516, n.48 (1976). The Missouri Supreme Court has recently stated that "administrative convenience . . . does suffice for equal protection purposes" in a case involving a constitutional challenge to a revenue statute. *Associated Industries of Mo. v. Director of Revenue*, 857 S.W.2d 182, 193, n.10 (Mo. banc 1993).

Thus, Mercy's point of error is not well founded because under current case law, if the Decision had held that administrative convenience would suffice in light of the facts involved in this case, that would have been proper under equal protection analysis.

V. It makes no difference whether Mercy wants to object to the use of twelve (12) month cost reports as a class; it is still a reasonable classification in light of the facts of this case.

In Mercy's argument section III it makes one more attempt to totally confuse the unwary. Mercy's contentions are out-of-context, for the Decision does not just rest upon a statement of the classification.

Clearly the Decision holds that the program does not purport to reimburse for actual costs, rather it reimburses for allowable costs as determined by DMS regulations. (A-5). Also the State has a legitimate interest in controlling the costs of the Medicaid program, and it is not unreasonable for the State to figure allowable costs from the last reviewed cost reports, because that would simplify accounting, and place the facilities on an equal twelve (12) months footing, averaging the costs by a common denominator of twelve (12) months. (A-5).

Clearly the Decision has articulated several valid reasons to justify the classification. Under equal protection analysis, if any state of facts can be articulated to justify the classification, it will be upheld. Thus, the classification involved in this case must be upheld. (See: *Folden*, Supra).

Conclusion

In an attempt to gain approval for the Writ of Certiorari, Mercy has attempted to distract the Court from the soundness of the actual holdings made by the Court of Appeals below. That Decision embodies the facial equal protection analysis that has been set by this Court's prior holdings.

For all of the these reasons, there is no justification for the Court to grant the Writ of Certiorari. Therefore, DMS respectfully prays for the Court to deny Mercy's Petition for Writ of Certiorari, and for any other relief as is just and proper under the circumstances.

Respectfully submitted,

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APPENDIX

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ST. LOUIS SOUTH PARK, INC., d/b/a MERCY CONVALESCENT, Respondent, vs. MISSOURI DEPARTMENT OF SOCIAL SERVICES, DIVISION OF MEDICAL SERVICES, Appellant.	)	No. WD 46944 OPINION FILED: April 27, 1993

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
The Honorable Byron Kinder, Judge

BEFORE FENNER, P.J., ULRICH and SMART, JJ.

Appellant, Missouri Department of Social Services, Division of Medical Services (the Department), appeals the decision of the circuit court which held that the Department's regulation implementing a new method of calculating the per diem rates to be paid nursing homes (the New Plan) violated equal protection. Respondent, St. Louis South Park, Inc., d/b/a Mercy Convalescent Center (Mercy), is a licensed nursing facility certified to participate in the Missouri Medicaid Program. Mercy successfully argued to the trial court that the New Plan denied it equal protection under the law.

THE NEW PLAN

On June 18, 1990, the Department published an emergency regulation in the Missouri Register, 13 CSR § 70-10.010, effective July 1, 1990, known here as the New

Plan. The New Plan set per diem rates for nursing homes participating in the Medicaid program. The 1988 cost report of each participating facility was used as the basis for determining the allowable per diem rate for a given facility.

Each participating facility's 1988 cost report covered a twelve month period based upon the facility's fiscal year ending in 1988. In 1988 there were 376 nursing homes participating in the Medicaid program. Of the total homes, 208, or 55%, had fiscal years ending December 31st. Mercy's fiscal year ended April 30th and it was one of only 5% of the participating homes which had a fiscal year ending April 30th or before.

The criteria for allowable costs as established by the Department are set forth in 13 CSR § 70-10.010. The participating facilities' 1988 cost report was used as a basis for establishing allowable costs because that was the most recent year that the Department had received and desk reviewed cost reports from all of the Medicaid participant nursing homes.[1]

Upon review of the facility's 1988 cost report, a base figure for allowable cost was determined. The base figure was multiplied by 111.1% (i.e. increased by 11.1%) and then $1.06 was added as a minimum wage adjustment. The greater of the rate determined by this calculation or the facility's rate in effect on June 30, 1990 became the facility's per diem rate effective for services provided on and after July 1, 1990. The Department then allowed another $.50 to

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[1] A desk review is defined under 13 CSR § 70-10.010(4)(G) as the Division of Medical Services' review of a provider's cost report without on site audit.

reflect a laundry allowance, $.47 was added as a trend factor[2] and $1.00 was added as a consultant adjustment. The result of these calculations became the facility's rebased rate effective July 1, 1990, subject to a ceiling of $54.95.[3]

The 11.1% adjustment was determined by multiplying 3.7% per year for a three year period (July 1, 1988 to June 30, 1991). The 3.7% represents the average of eight quarters of Gross National Product Implicit Price Deflator. The Administrative Hearing Commission (Commission) found that the 11.1% increase was an inflation factor, but recognized that the Department presented evidence that the increase was tied to a number of economic indicators.

The Commission found that nursing homes experienced increased costs due to inflation between April 30, 1988 and December 31, 1988. The Commission further found that since Mercy's fiscal year ended April 30, 1988, Mercy's rate under the New Plan did not take into account the inflation between said date and December 31, 1988, while those nursing homes with a fiscal year ending December 31, 1988 were allowed under the regulation to have inflation for the entire year factored into their rebased rates. The Commission determined that it was without authority to declare the regulation unconstitutional. Thus, the Commission affirmed the Department's determination of a rebased rate for Mercy in the amount of $48.49 per diem. On appeal to the circuit court the court held that the Department's failure to factor in inflation

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[2] The $.47 trend factor is 1% of the average rate of all Medicaid facilities on April 30, 1990.

[3] Mercy's rebased rate effective July 1, 1990 was set at $48.49 per patient day under the New Plan.

from April 30, 1988 to December 31, 1988 denied Mercy equal protection under the law.

POINT ON APPEAL

In its sole point on appeal, the Department argues that the circuit court erred by finding that the Department violated Mercy's right to equal protection of the law by setting Mercy's Medicaid rate according to 13 CSR § 70-10.010 because all Medicaid providers received a rate which reasonably reflects their cost experience.

Generally, in administrative review cases, an appellate court reviews the decision of the Administrative Hearing Commission. ***City of Cabool v. Missouri State Bd. of Medication*, 689 S.W.2d 51, 53 (Mo. banc 1985)**. However, administrative agency decisions based upon its interpretation of law are matters of independent judgment for a reviewing court. ***Golde's Dep't Stores, Inc. v. Director of Revenue*, 791 S.W.2d 478, 480 (Mo. App. 1990)**. Therefore, in the case at bar, the focus of our review turns to the equal protection question.

"The first principle of [an equitable protection] inquiry is that a duly enacted statute is presumed to be constitutional." ***Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991)**. A government action which neither creates suspect classifications nor impinges on a fundamental right will withstand scrutiny if the classification bears some rational relationship to a legitimate government interest. ***Id.***

The equal protection guarantee is directed against invidious discrimination. ***Id.*** "Invidious" means "tending to

excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating." ***Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 761-62 (1993) (citations omitted)**. The constitutional safeguard of equal protection is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. ***Mahoney*, 807 S.W.2d at 512** (quoting ***McGowan v. Maryland*, 366 U.S. 420, 425 (1961))**. In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification is imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." ***Dandridge v. Williams*, 397 U.S. 471, 485 (1970)** (citation omitted).

The question presented in the case at bar is whether 13 CSR § 70-10.010 denied Mercy equal protection by invidiously discriminating against Mercy due to the fact that other members of Mercy's class under the regulation were allowed to factor in inflation that was experienced from April 30, 1988 to December 31, 1988, while Mercy was not.

The Missouri Medicaid Program determines reimbursement rates for participating nursing homes prospectively on a basis that state determines as reasonable and necessary for efficient care providers. The Medicaid program does not purport to reimburse for actual costs. Rather, reimbursement is for allowable costs as determined by and in accordance with the state regulations. The state has a legitimate interest in controlling the costs of its Medicaid program in setting reimbursement rates for participating nursing homes.

It is not unreasonable for the state to calculate a base figure for allowable costs from the data provided by the participating facilities in their last reviewed cost report. Using said reports serves to simplify accounting procedures and places the facilities on an equal footing by reviewing a full twelve months of costs for each facility thereby taking into account any seasonal fluctuations in costs and averaging cost by a common denominator of twelve months. The fact that different facilities have different fiscal years and their cost reports cover different periods within 1988, does not render the state's regulation for rebasing nursing homes rates unlawful. Although this method of calculation does allow for variables between nursing homes, variables are unavoidable and the state's method of determining rates is not unjustly or irritatingly discriminating.

Mercy argues that it is invidiously discriminated against because other nursing homes are allowed to factor in inflation incurred between April 30, 1988 and December 31, 1988. However, any inflationary variable is outweighed by the state's interest in controlling costs, having an established report upon which to determine costs (i.e., the fiscal year end cost report), and treating the participating nursing homes similarly for a twelve month period based upon their fiscal year end cost reports.

It is Mercy's position that the Department should calculate inflation for the eight months from April 30, 1988 to December 31, 1988, and increase its base rate by the amount of said inflation. Mercy's position does not allow for the fact that approximately 12% of Mercy's 1988 allowable costs are fixed costs not subject to inflation for which an adjustment would have to be made. Moreover, to truly attempt to treat all facilities alike in regard to inflation, each facility would

have to be reviewed to determine actual inflation experienced within 1988. To adjust inflation on the basis of some general index would not allow for geographic differences in the cost of goods and services, purchasing habits, efficient management cost containment practices, actual inflation for a given period of time within 1988 and other variables.

Mercy's argument further lacks support from the evidence received reflecting the average cost, excluding capital costs, for all participating facilities from the 1988 cost reports. Mercy's evidence in this regard reflected that the average daily cost for facilities with a fiscal year ending April 30, 1988 was $42.18, while the average cost for facilities with a fiscal year ending December 31, 1988 was $39.28. This does not support Mercy's argument that it was denied equal protection by not being allowed to factor in inflation from April 30th to December 31st. If inflation were a significant factor, the average cost of facilities reporting December 31st would be expected to be higher than for those reporting April 30th.

To treat all participating facilities absolutely the same, if even possible to accomplish, further presents the potential for a great deal of research and additional accounting procedures that would potentially delay implementation of the revised rates and increase administrative costs to the detriment of the government and the program participants alike.

It is not unreasonable for the Department to rebase rates for nursing homes participating in the Medicaid program using the fiscal year end 1988 cost reports of the participating nursing homes without any adjustment for inflation for those nursing homes with fiscal years ending before December 31, 1988. Any inequality that the Department's method of

rebasing rates might allow is not unreasonable when measured against the state interest in the efficient distribution of limited public funds. The Department's use of fiscal year end 1988 cost reports was a reasonable, effective and efficient method of treating the participating nursing homes in a similar fashion when balances against the difficulty and additional accounting that would be required by an effort toward a more precise calculation which sought to consider actual inflation experienced by a given nursing home.

The judgment of the circuit court is reversed. The cause is remanded with directions to reinstate the decision of the Commission to the extent that it affirmed the Department's rebased rate for Mercy in the amount of $48.49.

All concur.

GARY A. FENNER,
Presiding Judge